

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

Affidavit

77-4171

To be argued by
RICHARD J. LEON

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4171

CAMILLO RIZZUTO,

Petitioner,

—against—

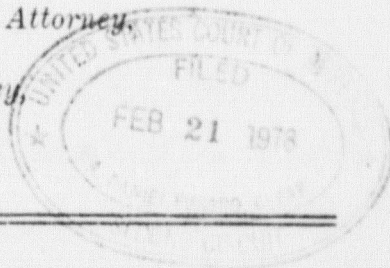
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

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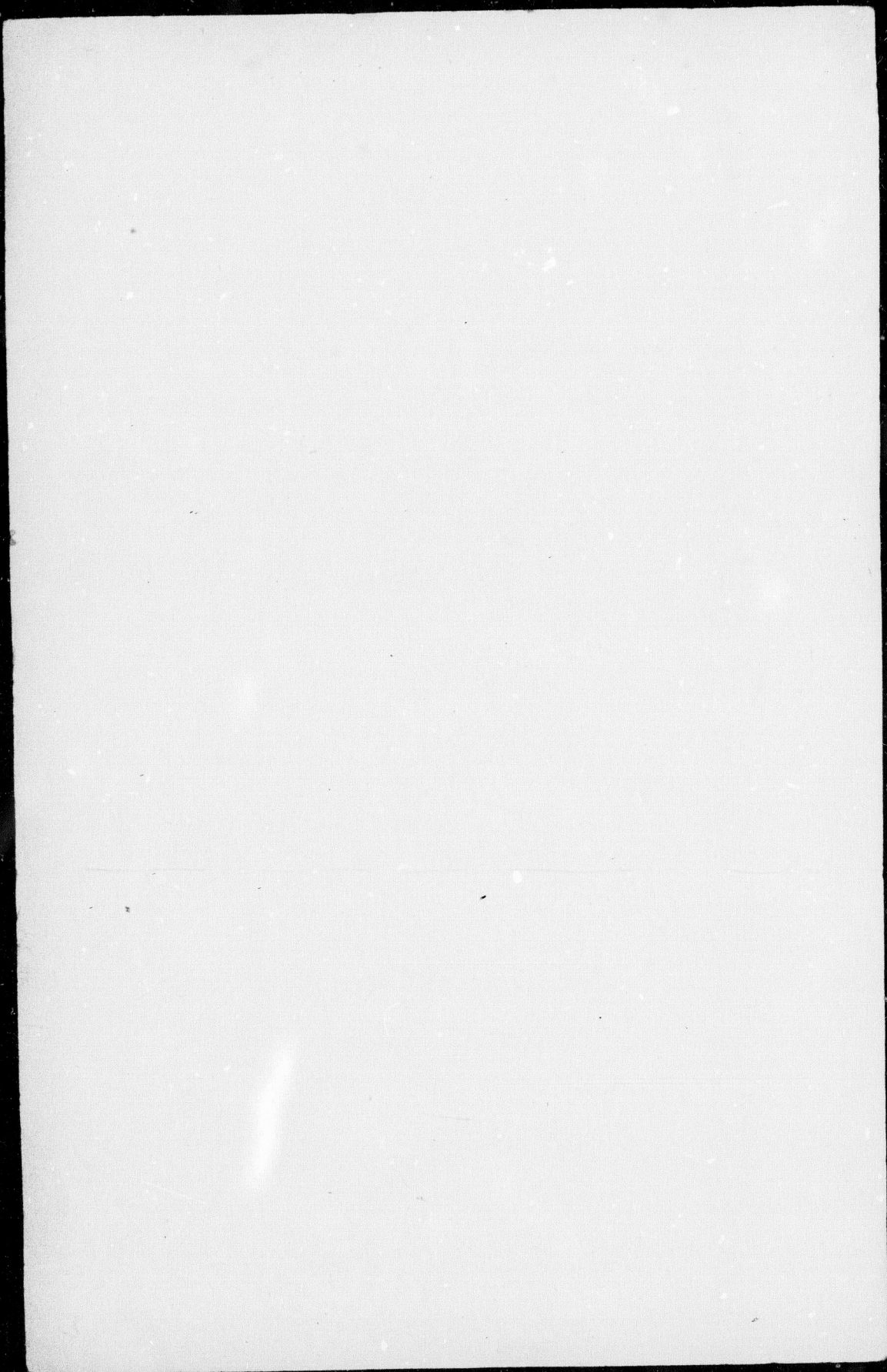


TABLE OF CONTENTS

	PAGE
Statement of Case	1
Issue Presented	1
Statement of Facts	2
Relevant Statutes	6
ARGUMENT:	
The Board Did Not Abuse Its Discretionary Authority By Refusing To Grant Petitioner's Application For Relief Under Section 212(c) of the Act, 8 U.S.C. § 1182(c)	8
A. Introduction	8
B. Section 212(c) of the Act, 8 U.S.C. § 1182 (c)	8
C. The Record In This Case Demonstrates That The Board Did Not Abuse Its Discre- tion	9
CONCLUSION	14

CASES CITED

<i>Bronsztejn v. I.N.S.</i> , 526 F.2d 1290 (2d Cir. 1975)	10, 13
<i>Chi Sheng Liu v. Holton</i> , 279 F.2d 740 (9th Cir. 1962)	11n
<i>Chung Young Chew v. Boyd</i> , 309 F.2d 857 (9th Cir. 1962)	11n
<i>Cisternas-Estay v. I.N.S.</i> , 531 F.2d 155 (3d Cir. 1976)	11n

	PAGE
<i>Francis v. I.N.S.</i> , 532 F.2d 268 (2d Cir. 1976)	9
<i>Giambanco v. I.N.S.</i> , 531 F.2d 141 (3d Cir. 1976) ..	12
<i>Lennon v. I.N.S.</i> , 527 F.2d 187 (2d Cir. 1975)	10
<i>Li Cheung v. Esperdy</i> , 327 F.2d 619 (2d Cir. 1967)	8
<i>Margano v. Pilliod</i> , 299 F.2d 217 (7th Cir. 1962) ..	11n
<i>Oliver v. U.S. Department of Justice</i> , 517 F.2d 426 (2d Cir.), <i>cert. denied</i> , 423 U.S. 1056 (1975)	10, 13
<i>Pilapil v. I.N.S.</i> , 424 F.2d 6 (10th Cir.), <i>cert. denied</i> , 400 U.S. 908 (1970)	11n
<i>Strantzalis v. I.N.S.</i> , 465 F.2d 1016 (3d Cir. 1972) ..	11n
<i>United States v. Bynum</i> , 485 F.2d 491 (2d Cir. 1973)	11
<i>United States v. Moten</i> , 564 F.2d 620 (2d Cir. 1976)	10
<i>United States v. Rizzuto</i> , 504 F.2d 419 (2d Cir. 1974)	2, 10
<i>Wong Wing Hang v. I.N.S.</i> , 360 F.2d 715 (2d Cir. 1966)	8

ADMINISTRATIVE DECISION CITED

<i>Matter Of Silva</i> , Interim Decision 2532 (B.I.A. 1976)	9
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STATUTES CITED

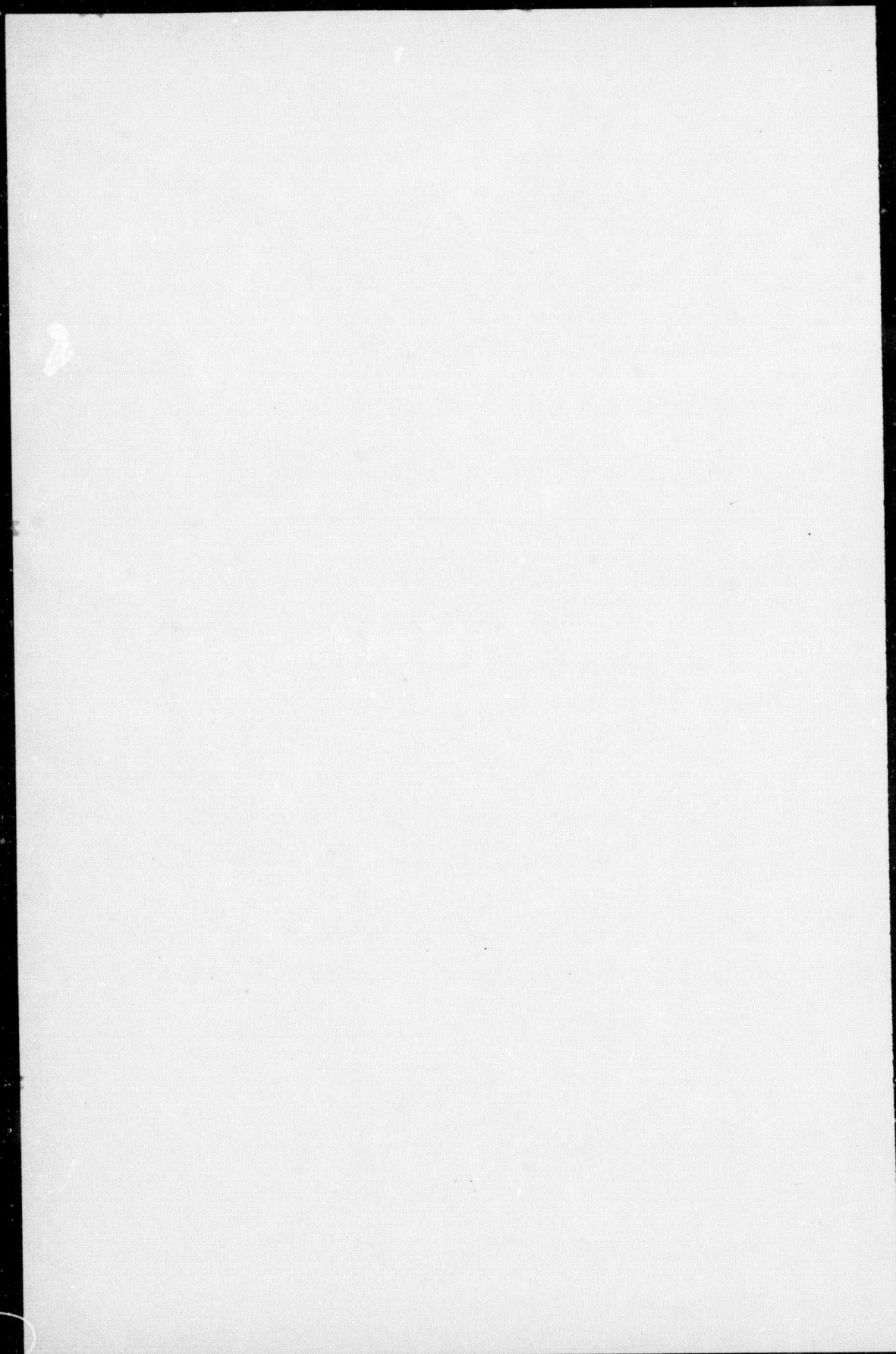
Immigration and Nationality Act, 66 Stat. 163 (1952) as amended:	
Section 106, 8 U.S.C. § 1105a	1
Section 106(a) (3), 8 U.S.C. § 1105a(a) (3)	6
Section 212(a) (17), 8 U.S.C. § 1182(a) (17)	3n
Section 212(c), 8 U.S.C. § 1182(c) <i>passim</i>	
Section 241(a) (4), 8 U.S.C. § 1251(a) (4)	13

	PAGE
Section 241(b)(2), 8 U.S.C. § 1251(b)(2) ..	12, 13, 14
Section 241(a)(11), 8 U.S.C. § 1251(a)(11)	3, 5n
Section 244(e), 8 U.S.C. § 1254(e)	3n, 4, 5n
Section 245, 8 U.S.C. § 1255	13
United States Code:	
18 U.S.C. § 2	2
21 U.S.C. § 841(A)(1)	2
21 U.S.C. § 841(B)(1)(a)	2
21 U.S.C. § 846	2

REGULATION CITED

Code of Federal Regulations (CFR):

8 C.F.R. § 242.14(c)	11n
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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-4171

CAMILLO RIZZUTO,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR THE RESPONDENT

Statement of Case

Pursuant to Section 106 of the Immigration and Nationality ("Act"), 8 U.S.C. § 1105a, Camillo Rizzuto ("Rizzuto") petitions this Court for review of a decision of the Board of Immigration Appeals ("Board") on August 25, 1977, dismissing Rizzuto's appeal from Immigration Judge Francis J. Lyons' discretionary denial of Rizzuto's application, under Section 212(c) of the Act, 8 U.S.C. § 1182(c), for a waiver of inadmissibility, the grant of which would have allowed him to remain in the United States instead of being deported for his previous conviction for possessing with intent to distribute 13 kilograms of heroin and for a related conspiracy.

Issue Presented

Whether the board abused its discretionary authority by refusing to grant petitioner's application for relief under Section 212(c) of the Act, 8 U.S.C. § 1182(c).

Statement of Facts

On August 29, 1964, Rizzuto, a 41 year old native and citizen of Italy, entered the United States at New York, New York, as a nonimmigrant visitor for pleasure. (AR 88).¹ He subsequently married a United States citizen, Maria J. Rizzo, on June 7, 1965 (AR 110) and based on this relationship adjusted his status to that of a lawful permanent resident on November 12, 1965. (AR 88-89).

On September 13, 1972, Rizzuto and four co-defendants were indicted in the Southern District of New York on two counts of violating the federal narcotics law. (AR 105-107). Count One charged all five defendants with conspiring to possess and distribute heroin in violation of Title 21, United States Code, Section 846. Count Two charged that on May 9, 1972 Rizzuto and co-defendant Anthony Castiglione possessed approximately 13 kilograms of heroin with the intent to distribute in violation of Title 21, United States Code, Sections 841(A)(1), 841(B)(1)(a), and Title 18, United States Code, Section 2.

On April 30, 1974 Rizzuto was convicted after a bench trial (Brieant, D.J.) in the United States District Court on both counts and was sentenced to concurrent four year terms of imprisonment to be followed by a special parole term of three years (AR 102-103). Subsequently, this Court, in an opinion describing the underlying facts, affirmed this conviction. (AR 101). *United States v. Rizzuto*, 504 F.2d 419 (2d Cir. 1974). Rizzuto began serving his sentence at the Federal Correctional Institution, Danbury, Connecticut ("prison") on February 18, 1975. (AR 113).

¹ References in this brief preceded by the letters "AR" are to the certified administrative record previously filed with this Court.

On November 4, 1975 the Immigration and Naturalization Service ("Service") commenced deportation proceedings against Rizzuto by issuing an order to show cause at a hearing. (AR 97). The order to show cause charged Rizzuto with being deportable under Section 1251(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), by virtue of his conviction for violating a law relating to the illicit trafficking in narcotics, to wit, possessing with intent to distribute 13 kilograms of heroin. (*Id.*).

Rizzuto's deportation hearing was conducted at the prison on August 11, 1976 before Immigration Judge Francis J. Lyons. (AR 63-86). At the hearing, Rizzuto conceded his deportability and applied for discretionary relief from deportation under Section 212(c) of the Act, 8 U.S.C. § 1182(c), (AR 64-65); and in the alternative, Rizzuto also requested the discretionary relief of voluntary departure.² Rizzuto testified on behalf of his application under Section 212(c) and presented two witnesses—his wife (AR 75-80) and the prison chaplain (AR 80-82)—and a letter to further support his application. (AR 64-82). In addition, Rizzuto attempted to introduce into evidence one or two sentences of the opening statement made by the prosecutor at his criminal trial which purportedly characterized Rizzuto's role in the narcotics conspiracy as being minor. (AR 72-83). Judge Lyons refused to admit the proffered excerpts, ruling that they would be out of context unless Rizzuto offered the entire 171 page transcript (AR 84). Rizzuto declined to do so.

² See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 U.S.C. § 244. This relief can be granted if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and thus facilitates any future lawful reentry into this country which he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17).

(*Id.*) Judge Lyons reserved decision at the close of the proceedings and requested the Service to furnish him with a report as to Rizzuto's possible release dates from the prison and what effect a finding of deportation would have on his parole status. (AR 84-86).

On September 8, 1976 Judge Lyons issued a decision (1) finding Rizzuto deportable; (2) denying as a matter of discretion his application for relief under Section 212(c) of the Act; and (3) finding him ineligible for voluntary departure under Section 244(e) of the Act. (AR 56-61). Although Judge Lyons recognized in his opinion the family equities presented by Rizzuto and the hardship that would result to Rizzuto and his family upon his deportation,³ he found, particularly in light of the nature of the crime, the magnitude of the narcotics operation involved, and Rizzuto's prolonged periods of unemployment, that Rizzuto had failed to demonstrate that he merited this extraordinary relief. Consequently, Judge Lyons entered an order deporting Rizzuto to Italy. (*Id.*).

On September 21, 1976 Rizzuto appealed Judge Lyons' decision to the Board, challenging *only* the denial of Rizzuto's application for relief under Section 212(c). (AR

³ The family equities Rizzuto presented were that his wife and three children were all American citizens and that he lived with them in a close family relationship. To substantiate that claim, he presented the prison chaplain, Father Coin, who attested, from his limited experience, to their close relationship. (AR 11). Further, his wife testified that she and the children loved Rizzuto and had a close relationship with him. (AR 77). With respect to hardship, Rizzuto testified that because of his limited education and lack of job skills, he would have difficulty finding work in Italy (AR 73) and, even if he did, he would not be able to support his family from abroad. (AR 74). Mr. Rizzuto further testified that her husband's deportation would ruin their marriage and their family life. (AR 75).

52).⁴ Rizzuto was subsequently paroled into the Service's custody on May 23, 1977 and released on a \$5,000 bond. (AR 36, 38).

On August 4, 1977 the Board heard oral argument on Rizzuto's appeal. (AR 10-21). Three weeks later, August 25, 1977, the Board issued an opinion upholding Judge Lyons' decision. (AR 7-9). In its decision the Board stated:

Although we recognize fully the respondent's residency and family equities, we are convinced that in this case the respondent's equities are not sufficient to overcome the adverse factors that militate against the favorable exercise of discretion.

The respondent's convictions are *recent*. The respondent was *not merely* convicted for *possession of heroin*, but was convicted for the *possession and conspiracy to possess a substantial amount of heroin for distribution*. [Emphasis added]. (AR 8-9).

Accordingly, the Board dismissed the appeal. (AR 9).

⁴ Rizzuto did not appeal Judge Lyons' denial of voluntary departure. In this regard, we note that Section 244(e) specifically precludes the application for voluntary departure of anyone who has been found deportable under Section 241(a)(11) of the Act because of a conviction for violating a law relating, *inter alia*, to the illicit traffic in narcotic drugs.

Further, it should be noted that Rizzuto also did not raise before the Board any issue regarding Judge Lyons' refusal to allow into evidence the opening argument of the prosecutor at Rizzuto's criminal trial. (AR 52, 23-31). However, he now seeks to raise that issue before this Court, contending that a favorable decision would warrant a remand of the case to the Board for reconsideration, in effect, of an issue it had never faced. See note 6, *infra*.

On September 21, 1977, Rizzuto filed a petition with this Court seeking to set aside the Board's decision. Consequently, Rizzuto has remained in the United States pursuant to the automatic statutory stay of deportation which accompanies every petition for review filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act, Section 212 (8 U.S.C. § 1182):

Sec. 212(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipine or any addiction-forming or addiction-sustaining opiate; or any alien who the consular officer or immigration officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs;

* * * * *

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) through (25) and paragraph (30) of subsection (a). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under Section 211(b).

Immigration and Nationality Act, Section 241 (8 U.S.C. § 1251):

Sec. 241(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any sale derivative or preparation of opium or coca leaves or isonipe-caine of any addiction-forming or addiction-sustaining opiate;

* * * * *

ARGUMENT

The Board Did Not Abuse Its Discretionary Authority By Refusing To Grant Petitioner's Application For Relief Under Section 212(c) Of The Act, 8 U.S.C. § 1182(c).

A. Introduction

Rizzuto asked both Judge Lyons during his deportation proceedings and the Board, thereafter on appeal, for the privilege of "returning" to a lawful unrelinquished domicile of seven consecutive years pursuant to Section 212(c) of the Act, 8 U.S.C. § 1182(c). This form of relief is extraordinary in nature and is granted as a matter of discretion. Both Immigration Judge Lyons and the Board denied Rizzuto's request.

In reviewing that exercise of discretionary authority by the Service this Court has an extremely narrow scope of review and is precluded from substituting its judgment for that of the Board unless the Board's determination is found to be without any rational explanation, to depart from established practices, or rest on an impermissible basis. *Wong Wing Hang v. I.N.S.*, 360 F.2d 715 (2d Cir. 1966); *Li Cheung v. Esperdy*, 377 F.2d 619 (2d Cir. 1967).

Rizzuto contends that this decision was arbitrary, capricious and an abuse of discretion. A review of the record, in light of this narrow scope of review, demonstrates the propriety of the Board's discretionary decision.

B. Section 212(c) of the Act, 8 U.S.C. § 1182(c).

Section 212(c) of the Act provides that an alien returning to the United States who is *excludable* under Section 212(c) of the Act, paragraphs (1) through (25)

and paragraph (30), may be granted a waiver of inadmissibility in the discretion of the Attorney General. In order to be eligible for this waiver, the alien must: (1) have been lawfully admitted for permanent residence; (2) have temporarily proceeded aboard voluntarily and not under an order of deportation; and (3) be returning to a lawful unrelinquished domicile of seven consecutive years.

In *Francis v. I.N.S.*, 532 F.2d 268 (2d Cir. 1976), this Court expanded the application of this discretionary relief by holding that the waiver of inadmissibility accorded aliens under Section 212(c) was equally available to permanent resident aliens who had been found deportable but had *not departed* from the United States following the act or acts which rendered them deportable. This position was subsequently adopted by the Service and the Board in *Matter of Silva*, Interim Decision 2532 (B.I.A. 1976). Consequently, under 212(c), as interpreted in *Francis*, Rizzuto had to demonstrate that he: (1) had been lawfully admitted for permanent residence; (2) had a lawful unrelinquished domicile of seven consecutive years; and (3) merited, as a matter of discretion, a waiver of his inadmissibility.

C. The Record In This Case Demonstrates That The Board Did Not Abuse Its Discretion.

The Board, as had Judge Lyons, found that the favorable factors presented by Rizzuto on behalf of his application were not sufficient to overcome the adverse factors that militated against granting this extraordinary relief. (AR 8-9). A review of the Board's decision demonstrates that it was neither arbitrary, capricious, nor an abuse of discretion.

The favorable factors presented by Rizzuto in the record were, in essence, threefold: (1) his family ties in

the United States; (2) the hardship which would result from his deportation; and (3) the length of his residence in the United States.⁵ The Board, as had Judge Lyons, specifically acknowledged in its opinion the existence of each of these factors. (AR 8). However, when it viewed these factors in light of the conviction itself, it did not find them substantial enough to merit this discretionary relief. This decision was reasonable.

Rizzuto was convicted of possessing, with intent to distribute, 13 kilograms of heroin as well as conspiring with others to distribute the same. The type and quantity of drug involved in this case were obviously critical factors in the Board's decision. The Board specifically noted in its opinion that it was not presented with merely a conviction for the illegal possession of narcotic drugs but rather a conviction for conspiring to distribute a "substantial" amount of a very serious drug. (AR 9). As Judge Lyons pointed out in his opinion, this was not a "small time operation" in which Rizzuto had involved himself. (AR 59). On the contrary, it was a very sophisticated and serious criminal activity. See *United States v. Rizzuto*, 504 F.2d at 419.

No doubt the Board, in drawing this distinction between possession (for self use) and trafficking, was mindful of the fact that Congress has always been particularly stringent in its deportation policies towards narcotics offenders. See *Lennon v. I.N.S.*, 527 F.2d 187, 194 (2d Cir. 1975); *Bronsztejn v. I.N.S.*, 526 F.2d 1290, 1291 (2d Cir. 1975); *Oliver v. U.S. Department of Justice*, 517 F.2d 426, 428 (2d Cir.), *cert. denied*, 423 U.S. 1056 (1975). This Court has itself, on a number of occasions, commented on the heinous nature of professional narcotics trafficking operations. See *United States v. Moten*, 564 F.2d 620, 624-25 (2d Cir. 1977);

⁵ See note 3 *supra*.

United States v. Bynum, 485 F.2d 491, 498-99 (2d Cir. 1973). Even though Rizzuto was apparently only a minor figure in the operation (AR 53, 89),⁶ the fact is that he was nonetheless engaged in a very serious and sophis-

⁶ Rizzuto argues in his brief that Judge Lyons erroneously ruled at the deportation hearing not to allow into evidence portions of the opening statement of the prosecutor in his criminal trial which allegedly characterized Rizzuto's role in the conspiracy as that of a "minor figure". Petitioner's Brief p. 14-16. This argument was not previously raised by Rizzuto's counsel in his notice of appeal (AR 52) or brief on appeal to the Board (AR 23-31) or appellate argument before the Board. (AR 11-20). Accordingly, the Board never ruled on this issue and therefore it is not properly before this Court. *Cisternas-Estay v. INS*, 531 F.2d 155, 160 (3d Cir. 1976). Compare *Chung Young Chew v. Boyd*, 309 F.2d 857, 861 (9th Cir. 1962); *Chi Sheng Liu v. Holton*, 297 F.2d 740, 744 (9th Cir. 1962) with *Pilapil v. INS*, 424 F.2d 6, 9 (10th Cir.), cert. denied, 400 U.S. 908 (1970).

In any event, Rizzuto's challenge to Judge Lyons' ruling is without merit. First, Judge Lyons acknowledged both at the proceeding (AR 83) and in his written opinion (AR 59) that Rizzuto's role in the conspiracy appears as described in the probation report to have been minor. Given that acknowledgement, it cannot fairly be concluded that Rizzuto was prejudiced by Judge Lyons' refusal to admit into evidence the excerpts of the prosecutor's opening statement.

Second, an immigration judge conducting a deportation hearing is not bound by the strict rules of evidence. See *Margano v. Pilliod*, 299 F.2d 217, 219 (7th Cir. 1962); *Strantzalis v. INS*, 465 F.2d 1616, 1018 (3d Cir. 1972). Under 8 C.F.R. § 242.14(c), Judge Lyons is given the discretionary authority to decide whether or not to admit a particular written statement into evidence. In this case he specifically refused to allow into evidence an isolated portion of Rizzuto's trial transcript without receiving the total transcript into evidence. (AR 83). This discretionary decision was based on the Judge's acknowledgment that such a statement, which is merely argument, would be out of context without reviewing the evidence produced during the trial. (AR 83-84). He afforded Rizzuto's counsel the opportunity to submit the whole trial transcript (AR 83, 84). Rizzuto's counsel declined to do so. Surely this decision was not an abuse of discretion.

ticated criminal activity. Moreover, the record indicates that prior to, at the time of and subsequent to his involvement in this particular conspiracy, Rizzuto was unemployed, had no particular job skills and only a sixth grade education. (AR 72-74). No doubt can exist that he was to be paid, probably handsomely, for his role in this operation.

In short, the Board was presented with an alien involved in a substantial and sophisticated narcotics transaction, a history of unemployment, little to no job skills and education, and limited speaking ability of the English language (even after 12 years in the United States). In light of these facts, and the recent occurrence of his criminal activity, the Board reasonably determined that Rizzuto's case was not a proper one for the favorable exercise of its discretion to allow him to remain in the country. Surely, the Board's decision not to grant Rizzuto's application for a waiver of inadmissibility can not fairly be characterized as arbitrary, capricious or an abuse of discretion.

Finally, Rizzuto's citation to *Giambanco v. I.N.S.*, 531 F.2d 141 (3d Cir. 1976) to support his argument (Brief p. 13) that where a criminal conviction creates the basis of an order of deportation against an alien, it should not also be used later to provide the sole basis to deny the alien discretionary relief, is completely misplaced.

In *Giambanco* the Third Circuit was confronted with a totally different factual situation from that in this case. The alien in that case had been convicted in the Eastern District of Pennsylvania of defrauding the United States by entering into a bogus marriage to acquire immigration benefits. As a result of that conviction he received a suspended sentence and two years probation. At the time of his sentencing, however, the federal trial judge, pursuant to Section 241(b)(2) of the Act, 8 U.S.C. § 1251-

(b) (2), recommended that the alien not be deported under Section 241 (a) (4) of the Act, 8 U.S.C. § 1251 (a) (4) for this conviction. When the alien subsequently applied to the Service for the discretionary relief under Section 245 of the Act, 8 U.S.C. § 1255, of adjustment of status to a lawful permanent resident, the Service denied the application as a matter of discretion primarily because of this previous conviction. The alien appealed that decision to the Board, which upheld it and thereafter appealed the Board's decision to the Third Circuit.

The Court, after analyzing the statutory sections involved, held that the Service, under these circumstances, should not be able to take that conviction into account for three reasons: ". . . (1) to maintain the integrity of the deportation recommendation of the trial judge [under Section 241 (b) (2)]; (2) to have the discretionary determination made by the actor best able to make it; and (3) to avoid a possibly unjust penalization of aliens such as Giambanco."

In this case Rizzuto was convicted of the type of offense (narcotics related) concerning which Section 241-(b) (2) specifically *precludes* a trial judge from recommending against deportation. The Congressional policy, embodied in this section, to treat narcotics related offenses more stringently by precluding recommendations against deportation, has been specifically upheld by this Court. *Bronsztein v. I.N.S.* 526 F.2d 1290, 1292, (2d Cir. 1975); *Oliver v. U.S. Department of Justice*, 517 F.2d 426, 428 (2d Cir.), *cert. denied*, 423 U.S. 1056 (1975). Accordingly, unlike the *Giambanco* Court, this Court is not presented with a situation in which the Service's reliance on the alien's conviction to deny him discretionary relief was, in effect, completely contrary to a statutorily authorized determination by a trial judge that the alien not be deported for the conviction.

Moreover, the discretionary relief sought in this case is completely different from that sought in *Giambanco*. Whether or not to grant a waiver of inadmissability under 212(c) demands, in essence, the very same determination required of a trial judge presented with a request for a recommendation against deportation under 241(b)(2). In order to reach that determination both the Service under 212(c) and the trial judge under 241(b)(2) must give due regard to the alien's criminal offense.

For these reasons the Third Circuit's decision in *Giambanco* is not applicable to this case and the Service should not be precluded from considering the nature of Rizzuto's offense in determining whether to grant the discretionary relief he sought under Section 212(c).

CONCLUSION

This petition for review should be dismissed.

Dated: New York, New York
February 21, 1978

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AFFIDAVIT OF MAILING

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County of New York)

Richard J. Leon being duly sworn,
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That on the
two copies
21st day of February 1978 he served ~~a copy~~ of the
within Appellee's Brief

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And deponent further says _____ he sealed the said envelope _____ and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, 100 St. Andrews Plaza, Borough of Manhattan, City of New York.

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